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April 25, 2013

FILED/ACCEPTED

BY HAND DELIVERY

APR 25 2013

Marlene H. Dortch
Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Federal Communications Commission
Office of the Secretary

Re: DISH Network L.L.C.; Affirmation of Compliance with Qualified Carrier Requirements; MB Docket No. 10-124

Dear Ms. Dortch:

Pursuant to Section 342(d) of Title 47, DISH Network L.L.C. ("DISH") submits to the Federal Communications Commission the attached copy of the affidavit affirming DISH's compliance with the requirements for a Qualified Carrier under Section 119(g)(4) of the Copyright Act. 47 U.S.C. § 342(d); 17 U.S.C. § 119(g)(4). This affidavit is submitted pursuant to the affirmation requirement set forth in Section 342(d) of the Communications Act. 47 U.S.C. § 342(d). Also attached to the affidavit are copies of all reports and orders issued by the District Court for the Southern District of Florida, the Special Master, and the Comptroller General regarding DISH's status as a Qualified Carrier.

Please do not hesitate to contact me with any questions.

Respectfully submitted,

Jeffrey H. Blum

Attachments

No. of Copies rec'd 014
List ABCDE

AFFIDAVIT OF REX POVENMIRE PURSUANT TO 17 U.S.C. § 119(g)(4)(C)

REX POVENMIRE, being duly sworn, hereby deposes and says to the best of his knowledge and belief:

1. I am the Vice President, Corporate Initiatives for DISH Network L.L.C. ("DISH"). In this capacity, I am the technical interface with our subcontractors EchoStar Technologies L.L.C. and EchoStar Satellite Services L.L.C. on matters related to bandwidth, satellite receivers, and other technical issues. This affidavit is based upon my personal knowledge and upon information provided to me.


2. On October 29, 2010, the United States District Court for the Southern District of Florida ("Court") issued an Order recognizing DISH as a qualified carrier pursuant to 17 U.S.C. § 119(g)(3). That Order also waived the Court's October 20, 2006 Injunction [DE-1020], pursuant to 17 U.S.C. § 119(g)(1).

3. As of April 23, 2013, DISH is in compliance with the requirements for a qualified carrier, as specified in Section 119(g)(4) of the Copyright Act. 17 U.S.C. § 119(g)(4). This affidavit is submitted pursuant to the affirmation requirement set forth in Section 119(g)(4)(C) of the Copyright Act. 17 U.S.C. § 119(g)(4)(C).

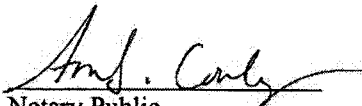
4. Pursuant to Section 119(g)(4)(C) of the Copyright Act, 17 U.S.C. § 119(g)(4)(C), attached to this affidavit are copies of the following orders and reports issued by the Court, the Special Master appointed pursuant to 17 U.S.C. § 119(g)(3)(B), and the Comptroller General:

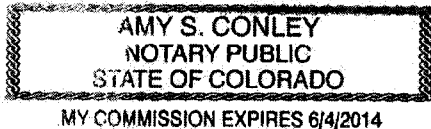
1. June 2, 2010 Order Granting Temporary Waiver of Injunction [DE-1178];
2. September 29, 2010 Order Granting Unopposed Motion for Extension [DE-1181];
3. October 25, 2010 Order Requiring Expedited Response [DE-1186];
4. October 29, 2010 Order Granting in Part Motion for the Appointment of a Special Master [DE-1189];
5. October 29, 2010 Order Granting Motion for Recognition as a Qualified Carrier and Waiver of This Court's October 20, 2006 Injunction [DE-1190];
6. November 24, 2010 Order Granting Appointment of a Special Master [DE-1192];

7. January 13, 2011 Order Approving Stipulation of Matters Pursuant to Rule 53(b)(2)(A)-(E) [DE-1195];
8. March 23, 2012 Report of the Government Accountability Office, "To Date, DISH Network Is Cooperating with the Court-Appointed Special Master's Examination of Its Compliance with the Section 119 Statutory License."
9. July 23, 2012 Report of Special Master [DE-1199];
10. July 25, 2012 Order Directing Clerk to Transmit Special Master's Report [DE-1201]; and
11. December 12, 2012 Report of the Government Accountability Office, "DISH Network Complied with the Court-Appointed Special Master's Examination of Its Compliance with the Section 119 Statutory License."


Rex Eovenmire
Vice President, Corporate Initiatives
DISH Network L.L.C.

Sworn to me on this
23rd day of April, 2013


Notary Public



Attachment #1

**June 2, 2010 Order Granting Temporary Waiver of
Injunction**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 98-2651-CIV-DIMITROULEAS

CBS BROADCASTING INC.,
ET AL.,

Plaintiffs,

v.

ECHOSTAR COMMUNICATIONS
CORP., ET AL.,

Defendants.

ORDER GRANTING TEMPORARY WAIVER OF INJUNCTION

Upon the Application For Temporary Waiver of the Court's October 20, 2006, Permanent Injunction [DE-1020] filed by DISH Network Corporation f/k/a EchoStar Communications Corp. ("DISH"), the Court finds that under Section 105 of the recently enacted Satellite Television Extension and Localism Act of 2010 ("STELA") (modifying 17 U.S.C. § 119), it is

ORDERED, ADJUDGED, AND DECREED that, pursuant to Section 105 of STELA, DISH is hereby granted a temporary waiver of the Court's October 20, 2006, Permanent Injunction Order [DE-1020] with respect to the statutory license provided under subsection (a)(2) to allow DISH to make secondary transmissions of primary transmissions made by a network station to unserved households located in short markets

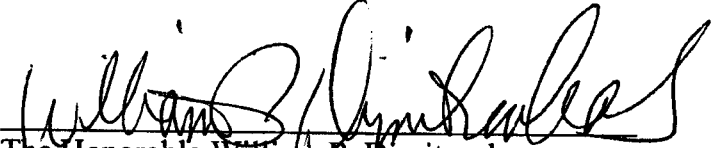
in which DISH was not providing local service pursuant to the license under section 122 of the Copyright Act as of December 31, 2009; it is

FURTHER ORDERED, ADJUDGED, AND DECREED that DISH's temporary waiver shall be effective beginning June 3, 2010; it is

FURTHER ORDERED, ADJUDGED, AND DECREED that DISH's temporary waiver *shall expire* after the end of the 120-day period beginning on June 3, 2010 unless extended for good cause by this Court; and it is

FURTHER ORDERED, ADJUDGED, AND DECREED that all terms in this Order including but not limited to "unserved households" and "short markets" shall be defined as those terms are defined in STELA.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 2nd day of June, 2010.


The Honorable William P. Dimitrouleas
United States District Court Judge

Copies furnished by counsel submitting the Application to:

David M. Rogero, Esq.
Wade H. Hargrove, Esq.
Gerald J. Waldron, Esq.
Thomas P. Olson, Esq.
Mark A. Nadeau, Esq.
John F. O'Sullivan, Esq.
Robert C.L. Vaughn, Esq.
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United States of America
Telephone: 480-606 5100
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Email: cindy.ricketts@dlapiper.com

Attachment #2

**September 29, 2010 Order Granting Unopposed
Motion for Extension**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 98-2651-CIV-DIMITROULEAS

CBS BROADCASTING INC., et al.,

Plaintiffs,

vs.

ECHOSTAR COMMUNICATIONS CORP., et al.,

Defendants.

ORDER GRANTING UNOPPOSED MOTION FOR EXTENSION

THIS CAUSE is before the Court upon DISH Network Corporation's Unopposed Motion for Extension of Temporary Waiver of this Court's October 20, 2006 Injunction [DE-1179], filed herein on September 28, 2010. The Court has carefully considered the Unopposed Motion and is otherwise fully advised in the premises.

Accordingly, it is **ORDERED AND ADJUDGED** that DISH Network Corporation's Unopposed Motion for Extension of Temporary Waiver of this Court's October 20, 2006 Injunction [DE-1179] is hereby **GRANTED**. DISH Network Corporation f/k/a EchoStar Communications Corporation's Temporary Waiver of the October 20, 2006 Injunction [DE-1178] shall be and is hereby extended for forty-five (45) days or through and including November 15, 2010.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 29th day of September, 2010.


WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:
Counsel of record

Attachment #3

**October 25, 2010 Order Requiring Expedited
Response**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 98-2651-CIV-DIMITROULEAS

CBS BROADCASTING INC., et al.,

Plaintiffs,

vs.

ECHOSTAR COMMUNICATIONS CORP., et al.,

Defendants.

ORDER REQUIRING EXPEDITED RESPONSE

THIS CAUSE is before the Court upon DISH Network Corporation's Motion for Recognition as a Qualified Carrier and Waiver of this Court's October 20, 2006 Injunction and for Expedited Briefing and Memorandum of Law in Support [DE-1182], filed herein on October 25, 2010. The Court has carefully considered the Motion, noting the November 15, 2010 expiration of the Court's temporary waiver [DE-1181], and is otherwise fully advised in the premises.

Accordingly, it is **ORDERED AND ADJUDGED** that any response to the instant Motion shall be filed on or before Friday, October 29, 2010. DISH Network Corporation may file a reply in support of the instant Motion on or before Wednesday, November 3, 2010.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this 25th day of October, 2010.


WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:
Counsel of Record

Attachment #4

**October 29, 2010 Order Granting in Part Motion for
the Appointment of a Special Master**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 98-2651-CIV-DIMITROULEAS

CBS BROADCASTING INC., et al.,

Plaintiffs,

vs.

ECHOSTAR COMMUNICATIONS CORP., et al.,

Defendants.

**ORDER GRANTING IN PART MOTION FOR
THE APPOINTMENT OF A SPECIAL MASTER**

THIS CAUSE is before the Court upon DISH Network Corporation's ("DISH") Motion for the Appointment of a Special Master Under Rule 53 of the Federal Rules of Civil Procedure and Accompanying Memorandum of Law in Support [DE-1183], filed herein on October 25, 2010. The Court has carefully considered the Motion, noting that Plaintiffs agrees with Defendant that a qualified person should be selected and appointed as a Special Master but Plaintiff objects to the appointment of the Honorable Major B. Harding [DE-1188], and is otherwise fully advised in the premises.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. DISH Network Corporation's ("DISH") Motion for the Appointment of a Special Master Under Rule 53 of the Federal Rules of Civil Procedure and Accompanying Memorandum of Law in Support [DE-1183] is hereby **GRANTED in part**;
2. A Special Master shall be appointed under Rule 53 of the Federal Rules of Civil Procedure in this action to conduct the examination and provide a report to the Court as provided in 17 U.S.C. § 119(g)(4)(B);

3. The parties shall have thirty (30) days from the date of this Order to confer and determine if they can agree on a candidate to recommend to the Court or, if not, to submit to the Court additional candidates for consideration by the Court. The Court has not eliminated former Chief Justice Harding as a candidate.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this
29th day of October, 2010.


WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:
Counsel of Record

Attachment #5

**October 29, 2010 Order Granting Motion for
Recognition as a Qualified Carrier and Waiver of This
Court's October 20, 2006 Injunction**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 98-2651-CIV-DIMITROULEAS

CBS BROADCASTING INC., et al.,

Plaintiffs,

vs.

ECHOSTAR COMMUNICATIONS CORP., et al.,

Defendants.

**ORDER GRANTING MOTION FOR RECOGNITION AS A QUALIFIED CARRIER
AND WAIVER OF THIS COURT'S OCTOBER 20, 2006 INJUNCTION**

THIS CAUSE is before the Court upon DISH Network Corporation's ("DISH") Motion for Recognition as a Qualified Carrier and Waiver of this Court's October 20, 2006 Injunction and for Expedited Briefing and Memorandum of Law in Support [DE-1185], filed herein on October 25, 2010. The Court has carefully considered the Motion, noting that Plaintiffs neither support nor object to entry by the Court of an order granting the Motion [DE-1187], and is otherwise fully advised in the premises.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. DISH Network Corporation's Motion for Recognition as a Qualified Carrier and Waiver of this Court's October 20, 2006 Injunction and for Expedited Briefing and Memorandum of Law in Support [DE-1185] is hereby **GRANTED**;
2. The Court recognizes DISH as a qualified carrier, pursuant to 17 U.S.C. § 119(g)(3);
3. The Court grants DISH a waiver of the Court's October 20, 2006 Injunction [DE-1020], pursuant to 17 U.S.C. § 119(g)(1).

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this

29th day of October, 2010.


WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:
Counsel of Record

Attachment #6

**November 24, 2010 Order Granting Appointment of a
Special Master**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 98-2651-CIV-DIMITROULEAS

CBS BROADCASTING INC., et al.,

Plaintiffs,

vs.

ECHOSTAR COMMUNICATIONS CORP., et al.,

Defendants.

ORDER GRANTING APPOINTMENT OF A SPECIAL MASTER

THIS CAUSE is before the Court upon the parties' Joint Stipulation Consenting to and Motion for Appointment of Special Master [DE-1191], filed herein on November 24, 2010. The Court has carefully considered the Motion and is otherwise fully advised in the premises.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. The Joint Stipulation Consenting to and Motion for Appointment of Special Master [DE-1191] is hereby **GRANTED**;
2. Douglas McDonald, Shareholder, Carlton Fields, 4221 West Boy Scout Boulevard, Suit 1000, Tampa, Florida, 33607, is hereby appointed to serve as a special master in the above-captioned proceedings in order to conduct the examination and provide a report to the Court as provided in 17 U.S.C. § 119(g)(4)(B);
3. The parties shall have thirty (30) days from the date of this Order to submit a proposal regarding those matters provided for in Federal Rule of Civil Procedure 53(b)(2)(A) -(E).

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this
24th day of November, 2010.


WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:
Counsel of Record

Attachment #7

**January 13, 2011 Order Approving Stipulation of
Matters Pursuant to Rule 53(b)(2)(A)-(E)**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 98-2651-CIV-DIMITROULEAS

CBS BROADCASTING INC., et al.,

Plaintiffs,

vs.

ECHOSTAR COMMUNICATIONS CORP., et al.,

Defendants.

**ORDER APPROVING STIPULATION OF
MATTERS PURSUANT TO RULE 53(b)(2)(A)-(E)**

THIS CAUSE is before the Court upon the parties' Joint Stipulation Consenting to and Motion for Approval of Matters Pursuant to Rule 53(b)(2)(A)-(E) [DE-1194], filed herein on January 13, 2011. The Court has carefully considered the Motion and is otherwise fully advised in the premises.

Accordingly, it is **ORDERED AND ADJUDGED** that the Joint Stipulation Consenting to and Motion for Approval of Matters Pursuant to Rule 53(b)(2)(A)-(E) [DE-1194] is hereby **GRANTED** and the matters pursuant to Rule 53(b)(2)(A)-(E) contained therein are hereby **APPROVED**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this 13th day of January, 2011.


WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:
Counsel of Record

Attachment #8

**March 23, 2012 Report of the Government
Accountability Office, "To Date, DISH Network Is
Cooperating with the Court-Appointed Special
Master's Examination of Its Compliance with the
Section 119 Statutory License"**



GAO

Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

March 23, 2012

Congressional Committees

Subject: To Date, DISH Network Is Cooperating with the Court-Appointed Special Master's Examination of Its Compliance with the Section 119 Statutory License

This report responds to the requirement, enacted in the Satellite Television Extension and Localism Act of 2010 (STELA),¹ mandating that the Comptroller General monitor and periodically report on the degree to which DISH Network (DISH)² is complying with the Special Master's³ examination of its compliance with the royalty payment and household eligibility requirements of the Section 119 statutory license.⁴ To respond to this mandate, we interviewed the Special Master and representatives of DISH, the National Association of Broadcasters (NAB), and the U.S. Copyright Office, and analyzed documents provided by these individuals. We found that, to date, DISH is complying with the Special Master's examination. In particular, DISH provided the Special Master with information on its subscribers and royalty payments, and is cooperating with NAB on a survey of all major network-affiliated television stations nationwide.

Background

The television broadcast industry provides free over-the-air programming to the public through local television stations; this is known as the primary transmission of the programming. However, more than 30 million U.S. households have access to broadcast programming through subscriptions to direct broadcast satellite (DBS) service.⁵ When a DBS operator provides its subscribers with access to broadcast programming, it is providing a secondary transmission of the programming. Because the broadcast programming is copyright protected, a license is required to secure the public performance rights for the secondary transmission of these works.⁶ Under existing law, two statutory licenses permit DBS operators, such as DISH or

¹Public L. No. 111-175, § 105, 124 Stat. 1218, (2010) amending title 17, U.S.C. by adding § 119(g)(4)(B)(vii).

²From 1996 through 2008, DISH Network was the media and entertainment arm of EchoStar Communications Corporation. In 2008, EchoStar divested DISH Network. In this report, we refer to DISH Network and its predecessor as DISH.

³A Special Master is appointed by a judge to carry out the duties set out in the order appointing him.

⁴The Special Master's examination and reporting requirements are set out at 17 U.S.C. § 119(g)(4)(B).

⁵In addition to DBS service, over 55 million households have access to broadcast programming through subscriptions to cable service.

⁶This is the right to show the copyright-protected work in public. 17 U.S.C. § 106(4).

DIRECTV®, to “clear” these copyrights, allowing them to offer secondary transmissions of broadcast programming.⁷ To take advantage of the statutory licenses, DBS operators must deposit with the U.S. Copyright Office a government-set royalty, which is later distributed to copyright owners.⁸

Congress has viewed localism as a primary legislative objective, with television broadcast stations serving as important sources of local news and public affairs programming. To protect local broadcast television stations and further the objective of localism, the Copyright Act,⁹ Communications Act of 1934,¹⁰ and Federal Communications Commission (FCC) regulations restrict the ability of cable and DBS operators to import broadcast signals from outside the local area. Two key regulations include the following:

- *Network nonduplication*: This rule protects local commercial and noncommercial broadcast television stations’ rights to be the exclusive distributor of network programming within their local area.¹¹
- *Syndicated exclusivity*: This rule protects the distribution rights for distributors of syndicated programming,¹² including local broadcast stations within a designated zone.¹³

The four major broadcast networks—ABC, CBS, Fox, and NBC—own or have affiliate television broadcast stations in most local television markets, known as designated market areas (DMA),¹⁴ throughout the nation. However, some local television markets lack access to one or more of the four major broadcast networks; these markets are referred to as short markets. Further, some households are unable to receive an adequate over-the-air signal from one or more of the local stations owned by or affiliated with the four major broadcast networks, typically because these households reside a significant distance from the television station’s broadcast tower; these households are also “unserved households.”¹⁵

To broaden service to unserved households, the Section 119 statutory license allows DBS operators to provide distant, out-of-market television broadcast signals to subscribers in short markets and to other unserved households;¹⁶ this is referred to as distant-into-local service. For

⁷17 U.S.C. §§ 119 and 122.

⁸The statutory licenses permit the public performance of the copyright-protected works in exchange for payment of royalties established using processes defined by statute.

⁹Title 17 of the United States Code.

¹⁰Act of June 19, 1934, ch. 652, 38 Stat. 1064, as amended (codified as title 47 of the United States Code).

¹¹47 C.F.R. §§ 76.92 and 76.122.

¹²Syndicated programming is non-network programming or postnetwork programming (a rerun) that is licensed directly to individual broadcast stations in more than one market.

¹³47 C.F.R. §§ 76.101, 76.103, and 76.123(b).

¹⁴Nielsen Media Research defines the DMAs. According to Nielsen, a DMA identifies an exclusive geographic area of counties in which the home market television stations hold a dominance of total hours viewed. There are 210 DMAs in the United States.

¹⁵FCC categorizes television broadcast signals by grades of signal strength, with Grade A being the strongest. An unserved household is unable to receive a signal of Grade B strength or better. Unserved households include homes of all types, including recreational vehicles and commercial trucks.

¹⁶With a statutory license, the DBS operator does not need to obtain the copyright holder’s permission for the secondary transmission as long as it follows the regulations and pays the Copyright Office the required royalty.

example, using the Section 119 statutory license, a DBS operator can provide its subscribers in Harrisonburg, Virginia, which lacks CBS and NBC affiliates, CBS and NBC stations from another television market, such as Washington, D.C. In addition to the Section 119 statutory license, a separate license found at Section 122 of title 17 of the United States Code allows DBS operators to provide local television broadcast signals to subscribers in the same local area; this is referred to as local-into-local service. For example, the Section 122 statutory license allows a DBS operator to provide its subscribers in Washington, D.C., with the broadcast programming from Washington, D.C., stations.

During the mid-1990s, DISH started providing satellite transmission of broadcast programming to its subscribers. Shortly thereafter, the four major broadcast networks and others filed suit alleging that DISH provided distant, out-of-market television broadcast signals to served households, which were ineligible for such service. In 2006, following a decision by the Eleventh Circuit Court of Appeals, DISH was found to have engaged in a pattern or practice in violation of Section 119 by improperly transmitting distant network signals to ineligible households and was permanently enjoined from providing distant-into-local transmission of all programming originating on stations affiliated with the four major broadcast networks.¹⁷

In 2010, Congress, through STELA, amended 17 U.S.C. § 119 to provide a remedy permitting DISH to seek relief from the injunction issued under Section 119. By providing local-into-local service in all 210 DMAs, DISH became eligible for recognition as a “qualified carrier” and to then request that the court waive its injunction. On June 30, 2010, DISH filed an Application for Certification with FCC requesting qualified carrier status under Section 119, which FCC granted on September 1, 2010. However, as a further condition for approval, Congress directed the court to appoint a Special Master to conduct a compliance examination of DISH. On November 24, 2010, in accord with 17 U.S.C. § 119(g)(4)(B), the District Court for the Southern District of Florida appointed a Special Master under rule 53 of the Federal Rules of Civil Procedure to perform the required examination and report his findings to the court. The Special Master is required to examine and file a report on DISH’s compliance with the household eligibility requirements associated with the Section 119 license and the royalty payments to the Copyright Office. The Special Master commenced his examination in accordance with the statute in October 2011 and must file his report by July 24, 2012. If the qualified carrier (DISH) is found to have willfully made a secondary transmission in violation of the statute, the waiver will be lifted and the permanent injunction will be reinstated.

To Date, DISH Is Cooperating with the Special Master’s Examination

DISH is cooperating with the Special Master’s examination, which consists of examining DISH’s compliance with the royalty payment and household eligibility requirements of the license under Section 119. Since beginning his examination, the Special Master has been holding regular meetings with representatives of DISH and NAB, which represents the four major networks and their affiliates. The Special Master requested, and DISH provided, information on DISH’s royalty calculations and payments to the Copyright Office.¹⁸ The Special Master told us that he is satisfied with the information provided by DISH to date and is currently in the process of reviewing the methodology DISH used for its royalty payments. To determine whether any problems exist with DISH’s services to eligible subscribers, and whether a more detailed

¹⁷*CBS Broadcasting, Inc. v. EchoStar Communications Corp.*, 450 F.3d 505 (11th Cir. 2006).

¹⁸DISH also provided the Special Master with a report on its recreational vehicle and commercial truck subscribers.

examination of DISH's records may be needed, DISH and NAB are collaborating on a survey of all major network-affiliated television broadcast stations nationwide. According to the parties, the survey is to be distributed twice: once in February 2012 and again in May 2012, to ensure that affiliated stations are not having issues with DISH's services. The Special Master has been kept apprised of the development of this survey and expects to discuss the findings of the survey in his July 24, 2012, report.

According to the Special Master and officials representing the broadcast networks, DISH is complying with the royalty payment and household eligibility requirements. As of January 30, 2012, DISH had submitted four royalty payments to the Copyright Office for distribution to the copyright owners. The Copyright Office officials said that there have been no objections filed regarding DISH's royalty payments. In addition, DISH expanded its local-into-local service to include all 210 DMAs. DISH officials told us that the company is providing distant signals only to subscribers in short markets and eligible recreational vehicles and commercial trucks. Officials from NAB noted that they have not heard any complaints from local television stations regarding DISH's provision of distant signals, in contrast to the situation prior to the litigation and STELA.

Agency and Third-Party Comments

We provided a draft of this report to DISH Network, the Federal Communications Commission, and the Special Master for review and comment. The Special Master noted that the draft report correctly represented the results he has found so far in his investigation and analysis. DISH Network provided technical comments that we incorporated as appropriate. The Federal Communications Commission did not have comments.

We conducted this performance audit from October 2011 to March 2012 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

We are sending copies of this report to DISH Network; the Chairman, Federal Communications Commission; and the Special Master. In addition, the report is available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staffs have questions about this report, please contact me at (202) 512-2834 or goldsteinm@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Key contributors to this report were Mike Clements (Assistant Director), Martha Chow, and Bert Japikse.



Mark Goldstein
Director
Physical Infrastructure Issues

List of Addressees

The Honorable Patrick J. Leahy
Chairman
The Honorable Chuck Grassley
Ranking Member
Committee on the Judiciary
U.S. Senate

The Honorable John D. Rockefeller
Chairman
The Honorable Kay Bailey Hutchison
Ranking Member
Committee on Commerce, Science, and Transportation
U.S. Senate

The Honorable Lamar Smith
Chairman
The Honorable John Conyers, Jr.
Ranking Member
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The Honorable Fred Upton
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Attachment #9

July 23, 2012 Report of Special Master

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CBS BROADCASTING INC., et al.

Plaintiff,

v.

Case No. 98-2651-cvi-DIMITROULEAS

ECHOSTAR COMMUNICATIONS
CORP., et al.,

Defendant.

REPORT OF SPECIAL MASTER

This report and the information contained therein, have been compiled and are being presented pursuant to 17 U.S.C. §119 (j)(4)(B)(i-iv), a portion of the Satellite Television Extension and Localism Act ("STELA") of 17 U.S.C. §119.

Summary

This report is based upon the results of the examination of the records provided by DISH Network LLC ("DISH"), and information provided by CBS Broadcasting Inc. ("CBS"), Fox Broadcasting Company ("Fox"), ABC Inc. ("ABC") and National Broadcasting Company ("NBC") (collectively, the "Networks") and from the four trade associations, whose members consist of local stations affiliated with each of the Networks (the "Associations") and from groups of content providers. From this examination, described in greater detail below, it is my opinion, as Special Master, that the evidence available does not indicate that DISH provides distant signals to customers who are not eligible subscribers or that the calculation and payment of copyright royalties by DISH, under the statutory license in 17 U.S.C. §119 are not proper. Further, with apparent compliance by DISH with the terms of the statutory license, I have found no substantial evidence that a copyright holder could, at this time, bring a successful action under STELA against DISH for copyright infringement.

Detailed Report

1. Background

During the 1990's DISH, then known as EchoStar Communications Corp ("EchoStar"), provided satellite television programming to subscribers, conducting its business under the trade name of "DISH Network" ("Dish"). Under the Satellite Home Viewer Act of 1988 ("SHVA") and its successor laws, including the Satellite Home Viewer Improvement Act of 1999 (SHVIA), EchoStar operated under compulsory, statutory licenses to provide secondary transmissions of distant network programming to households that were unserved by local affiliates of one or more of the television broadcast "networks" as that term is defined by SHVA. A "distant" network signal is a television signal from a network station licensed to a community outside a subscriber's market area. "Unserved households" under SHVA are households that are unable to receive a signal from a local station affiliated with a specific network at a specified level of signal quality through the use of conventional over-the-air antennas.

In November 1998, the Networks, and the Associations filed suit in the United States District Court for the Southern District of Florida, claiming that EchoStar/DISH was violating the compulsory license conditions of SHVA by providing distant Network stations to large numbers of households that already were served by Network signals from local stations and did not meet the definition of "unserved households" permitted under SHVA. In 2003 the District Court found that EchoStar/DISH retransmitted the Networks' programs to hundreds of thousands of served households, *i.e.*, households that could receive the same network programming from a local affiliate of that network, constituting willful or repeated copyright infringement under 17 U.S.C. §119 (a)(7)(A), and warranting an injunction against further such infringement. *CBS Broadcasting Inc., et al v. EchoStar Communications Corp., et al*, 276 F. Supp. 2d 1237, 1256 (S.D. Fla, 2003). The 11th Circuit Court of Appeals affirmed entry of the injunction, expanded the scope of the injunction, and remanded the case to the District Court for such entry. *CBS Broadcasting Inc., et al v. EchoStar Communications Corp., et al*, 450 F.3d. 505, 527 (11th Cir.

2006). In 2006, judgment was entered, including a permanent injunction against DISH's use of the statutory license provided in Section 119(a)(2) of the Copyright Act to retransmit distant network signals, which injunction was to take effect on December 1, 2006. *CBS Broadcasting Inc., et al v. EchoStar Communications Corp., et al*, 472 F. Supp.2d 1367, 1373 (S. D. Fla, 2006). Thereafter, DISH continued to retransmit distant, non-network broadcast stations pursuant to Section 119(a)(1) of the Copyright Act, 17 U.S.C. § 119(a)(1), and continued to avail itself of the local-into-local statutory license in Section 122 of the Copyright Act, 17 U.S.C. § 122.

In 2010, Congress passed STELA. STELA amends certain sections of the United States Copyright Laws (Title 17 U.S.C.) and provisions of the Communications Act (Title 47 U.S.C.) and addresses the retransmission of distant, out-of-local-market, television broadcast signals by satellite to eligible subscribers. *Id.* Section 105 of STELA provides that a satellite carrier that provides local-into-local television broadcast signals to all 210 Nielsen-defined designated market areas ("DMAs") as (defined in 17 U.S.C. §122(j)(2)(C) in the United States may become a "qualified carrier." STELA § 105 (amending 17 U.S.C. §119 (g)). A qualified carrier is entitled to a waiver of a previously issued court injunction that prohibits the carrier from using the compulsory statutory copyright license under Section 119(a)(2) to offer distant television signals to qualified subscribers. STELA also sets forth a mechanism by which a satellite carrier can obtain a temporary waiver of such injunction. See 17 U.S.C. §119(g)(2). On June 2, 2010, DISH obtained a temporary waiver of this injunction to allow DISH to retransmit distant network stations to unserved households located in "short markets" where DISH was not providing local service pursuant to the local-into-local license under Section 122 of the Copyright Act as of December 31, 2009. This temporary waiver was set to expire on September 29, 2010. DISH made an unopposed motion to the Court on September 28, 2010, requesting that the temporary waiver be extended for 45 days. On September 29, 2010, the Court granted the motion and extended the temporary waiver until November 15, 2010.

DISH also applied to the Federal Communications Commission ("FCC") to receive a certification as a qualified carrier pursuant to the procedures and criteria set forth in STELA, and was granted that certification on September 2, 2010. *Application of DISH Network, LLC for Qualified Carrier Certification*, F.C.C. 10-159 (September 2, 2010). On October 25, 2010, DISH filed a Motion for Recognition as a Qualified Carrier and Waiver of 2006 Injunction, and the Court granted that motion on October 29, 2010.

Another section of STELA, 17 U.S.C. §119 (g)(4)(B)(i-iv), requires that a Special Master be appointed by the Court to conduct an examination of, and file a report on, the qualified carrier's compliance with the royalty payment and household eligibility requirements of the license granted to the carrier. This document constitutes that report.

2. Description Of Special Master's Investigation

(a) Responsibilities of Special Master

A Special Master appointed by the Court is directed to conduct an examination of, and file a report on, DISH's compliance with the royalty payment and household eligibility requirements of the distant signal statutory license. 17 U.S.C. §119(g)(4)(B)(i). The report is to address DISH's conduct from September 1, 2010, to April 30, 2012. *Id.*

DISH is required to provide to the Special Master all records that the Special Master considers to be directly pertinent to provision of service under the statutory license provided in 17 U.S.C. §119 to eligible subscribers only, and to proper calculation and payment of royalties under the statutory license. 17 U.S.C. §119(g)(4)(B)(ii). The Special Master is required to file the report not later than July 24, 2012, with the United States District Court for the Southern District of Florida, which issued the previous injunction against DISH, with the Court transmitting a copy to the Register of Copyrights, the Committees on the Judiciary and on Energy and Commerce of the House of Representatives, and the Committees on the Judiciary and Commerce, Science and Transportation of the Senate. 17 U.S.C. §119(g)(4)(B)(iii). Included in the report of the Special Master is to be a statement of whether the examination that he conducted indicated that

there is substantial evidence that a copyright holder could bring a successful action under 17 U.S.C. §119 against DISH for copyright infringement. 17 U.S.C. §119(g)(4)(B)(iv).

(b) DISH's Distant Network Statutory License

The statutory license under which DISH provides secondary transmissions of television signals to its subscribers is set forth in various sections of 17 U.S.C. §§119 and 122. It provides for "secondary transmission of television signals." Such secondary transmission refers to the satellite transmission by DISH to its subscribers of signals that are broadcast, over the air, by stations affiliated with networks (as that term is defined in the statute) in a local DMA, and also signals from non-network stations,¹ 47 U.S.C. §119(a)(1-2). This secondary transmission is of signals in the subscribers' local market (DMA) that are either network stations or non-network stations. A network station is defined as a television station licensed by the Federal Communications Commission that is owned or operated by or affiliated with one or more of the television networks, or is a noncommercial educational broadcast station. 17 U.S.C. §119 (d)(2).

In a market, or DMA, where DISH has commenced local service pursuant to the statutory license under Section 122, 17 U.S.C. § 122, DISH is required to carry, upon request, the signals of all television broadcast stations located within that local market, *see* 47 U.S.C. § 338(a)(1), subject to DISH obtaining the necessary retransmission consent pursuant to 47 U.S.C. § 325(b). In some markets, the programming of one or more of the four Networks is not offered by any local television broadcast station located in that DMA, and this constitutes a "short market" with respect to the particular network. As noted above, unserved households eligible to receive a distant network signal include households that cannot receive an over-the-air signal of sufficient strength from a station affiliated with the referenced network and broadcasting from within the household's DMA. *See* 47 U.S.C. § 119(d)(10). The definition also encompasses qualified recreational vehicles and commercial trucks. 17 U.S.C. §§ 119

¹ Also known as "superstations."

(a)(11)(A)(i), 119(d)(10)(D). By definition, therefore, households in short markets are “unserved households” with respect to any missing network broadcast stations. 17 U.S.C. §119 (d)(10).

DISH, as a satellite carrier, is authorized to provide a distant signal of a network station affiliated with the same network if, among other things, with respect to a local network station, a subscriber is in an unserved household, as defined in 17 U.S.C. 119 (d)(10)(A), 47 U.S.C. §339 (a)(2)(D) and 47 U.S.C. §339 (a)(1). Under such statutory license DISH must provide to each network a list identifying, by name and address, all subscribers to whom it makes secondary transmissions to subscribers in unserved households and must update that list to the networks on a monthly basis. 17 U.S.C. §119 (a)(2)(C)(i and ii).

Pursuant to that statutory license DISH must also, on a semi-annual basis, deposit with the Register of Copyrights a statement of account specifying names and locations of all non-network stations and distant network stations whose signals were retransmitted to subscribers, and the total number of subscribers that receive such retransmissions, all along with a royalty fee payable, computed by multiplying the standard royalty rates by the total number of subscribers receiving secondary transmissions of each non-network station and each distant network station during each calendar year, by month. 17 U.S.C. §119(b)(1)(A)(D). If DISH were to fail to provide such statement of account and royalty fee payment, DISH could be liable for a claim of copyright infringement. 47 U.S.C. §119(a)(4).

3. Data Provided by DISH and Reviewed by Special Master

(a) Monthly Reports of Imported Signals

DISH has provided to the Special Master sixteen sets of CD-ROM disks, one set for each month from January 2011 through April 2012, each set comprising one CD-ROM for each of the four major Networks. Directory listings of each of these 64 disks are included, for identification purposes, as Exhibit 1. These were represented by DISH to be copies of the disks that DISH has provided to each of those Networks on a monthly basis, and no objection was made to that representation. On these disks were provided lists of information that DISH

represented to include all of the DISH subscribers in Nielsen DMAs, in which DISH provides distant Network signals to households under Section 119(a)(2) of the Copyright Act, including unserved households to which DISH does not make available a local Network signal, along with recreational vehicle and commercial truck subscribers and an index of the imported distant signals for each Network. The information on these disks lists, by the individual subscriber's name and address, each subscriber receiving such a distant Network signal. This information is available for calculating royalty fees due for all such importation of distant signals, and I have not been advised of any objections to the authenticity of this information. I have reviewed multiple, representative samples of these disks, and each of the Networks has presumably reviewed their disks in detail at the time that each of them received its copy of the relevant disks for its network. Because of the bulk of the 64 CD-ROM disks, they are not included with this report but have been retained by the Special Master, pending submission and acceptance of this Report.

DISH believes this Nielsen DMA approach to defining unserved households to be more conservative and limiting to DISH than the procedure set forth in 17 U.S. § 119(a)(2)(B), which is based upon measurement of the strength of each signal at each subscribers residence. The use of Nielsen DMA appears to be supported in 17 U.S.C. § 122, regarding the statutory license, and more particularly in 17 U.S.C. § 122 (g)(2).

(b) Copyright Office Submissions

DISH has also provided copies of the submissions that it has represented as being provided to the Copyright Office, covering the period of January 1, 2010, through December 31, 2011, and a listing, by month, for each 6-month period, the total numbers of subscribers for distant signals of Network stations and for non-network stations, broken down for private home viewers and commercial viewers. The submissions also include the computation of royalties for each of those groups and also copies of the submissions to the Copyright Office of the royalty payments due for each 6-month period. The portions of this information submitted to the

Copyright Office are matters of public record, and copies of these portions are attached to this report as Exhibit 2.

(c) Auditor's Report

DISH has provided a description of its accounting procedures to maintain internal control over its financial reporting and, with that description, provided a copy of its Auditor's Report of Independent Registered Public Accounting Firm, in which the auditor, KPMG LLP, stated that DISH's financial statements present fairly the results of the operations of DISH and its subsidiaries. (Ex. 3).

4. Evaluation of Data from DISH

(a) Delivery of Distant Signals to Eligible Subscribers Only

(i) Recreational Vehicles and Commercial Trucks

As of April 30, 2012, signals from distant Network stations were provided by DISH to two types of "unserved households," as defined in 17 U.S.C. §119. One type comprises eligible recreational vehicles and commercial trucks, as provided in 17 U.S.C. §119(a)(11). DISH has provided a description of the methodology for qualifying subscribers to receive these signals in recreational vehicles and trucks, which is included, with a supporting declaration, as Exhibit 4. Briefly, DISH requires such a customer to establish a specific account for such a vehicle. DISH then requires the customer to complete and return a signed declaration attesting that the satellite dish is permanently attached to the vehicle and will not be used to receive satellite programming at any fixed dwelling. Then, DISH requires the subscriber to submit a photocopy of the current state vehicle registration and, for a commercial truck, a copy of a valid, current, commercial driver's license. DISH then sends to each network that owns or is affiliated with each distant network station transmitted to the vehicles, copies of the signed customer declaration, the vehicle registration, and if applicable, the commercial driver's license. DISH states that, as of January 1, 2012, it had approximately 277 subscribers in these two categories (Ex. 4).

(ii) Unserved Households in Short Markets

DISH also provides distant network stations to "unserved households" in "short markets" as provided in 17 U.S.C. §119(a)(2)(B). DISH has described the procedure it uses to determine which subscribers are eligible to receive distant network stations in short markets (Ex. 5, including supporting Declaration of Robert Olson) and has provided a listing of distant stations broadcast into short markets (Ex. 6). The following summarizes the explanation of that procedure.

(1) Identification of Short Markets

DISH stated that it uses a software program (the "Bill & Track Software") to bill subscribers and track subscriber accounts. (Ex. 5). This program uses specific service codes to identify the particular programming services to which each customer subscribes. A particular code (the "Full Package Code") on an account indicates that the subscriber receives from DISH the full package of broadcast stations for the subscriber's assigned Nielsen DMA. Based upon zip codes for each customer's address, DISH determines within which Nielsen DMA each subscriber resides. DISH then identifies the DMAs that are short markets, based on Nielsen data, and determines which, if any, of the four most widely viewed television networks (ABC, CBS, NBC, and FOX) are not being transmitted in the DMA by any local television broadcast station. For each missing affiliate for any of the Networks in a short market, DISH selects an out-of-market broadcast station of the same Network affiliation and imports that station's signal, the distant signal, into the short market. The imported distant Network station or stations are added to the lineup of the local broadcast stations that subscribers of that DMA receive, pursuant to the local-into-local license under Section 122 of the Copyright Act, 17 U.S.C. §122.

In order to identify subscribers who reside in short markets and thus are eligible to receive at least one distant network station, DISH uses another software program (the "DMA Software") that identifies the Nielsen DMA in which each subscriber resides. The DMA Software

uses Nielsen-defined geographical boundaries to identify the correct Nielsen DMA based upon each subscriber's service address and zip code.

(2) Determining the Number of Subscribers Receiving Distant Network Stations in Each Short Market

To calculate the number of subscribers receiving a distant network signal, DISH queries the Bill & Track Software to count all of the subscribers identified as residing in each short market DMA who also have the Full Package Code attached to their accounts. Those DISH subscribers having the Full Package Code on their account receive all of the local broadcast stations available for their DMA, plus any distant signal imports that may have been added to that lineup because of the market's status as a short market for the relevant networks. DISH then compiles a listing of all subscribers with the Full Package Code residing in each short market DMA, with that number constituting the total number of DISH subscribers who receive the imported distant signal for a given network as to that DMA. That number is then included in the total count used to calculate the royalty payment due to the Copyright Office for the statement of account that DISH submits each six months. *Infra*.

(b) Calculation of Monthly Subscriber Counts for Copyright Royalty Payments for Distant Signals

The procedures for calculating monthly subscriber accounts are contained in the Copyright Office Statement of Account for semi-annual copyright payments, and documents provided by DISH indicate that DISH follows this procedure. (See Ex. 2). DISH counts the number of subscribers receiving each distant network station on the last day of each month in the relevant six-month reporting period. Then, the totals for each of those six months are added together, with the total multiplied by the royalty rate for that reporting period (currently \$0.25 per distant network station per private subscriber) to determine the total copyright royalty payment due for that particular distant network station for that reporting period.

The same procedure is used if a particular short market is missing more than one of the networks stations, because, for any given short market, all subscribers having the Full Package

Code receive all of the local stations available in that market plus distant station signals for the network stations that are not present in that local short market.

(c) Method of Calculating Royalties Due for Non-Network Stations Retransmitted by DISH

In addition to the local stations and any distant network stations required to fill in a short market, DISH also retransmits a total of eight non-network stations in certain markets throughout the country pursuant to 17 U.S.C. §119(a)(1). (See Ex. 2). These non-network stations, or "superstations", comprise KWGN, KTLA, XETV, WPIX, WSFL, WSBK, WOR, and WGN. DISH uses the above-referenced Bill & Track Software to track and count subscribers who receive particular non-network stations, based upon the particular service codes that are assigned to each account to indicate that stations to which that account is subscribed. (See Ex. 5).

To determine the number of subscribers receiving each non-network station, DISH counts the number of those subscribers receiving each non-network station on the last day of each month of the relevant six-month reporting period. The totals for each of those six months are added together and then multiplied by the royalty rate for that reporting period (presently \$0.25 per non-network station per subscriber) to obtain the total copyright royalty payment due for each non-network station for that reporting period. DISH also offers certain non-network stations to commercial establishments in select DMAs. These accounts have specific codes to indicate a commercial account. On the last day of each month, DISH runs a query in the Bill & Track Software to derive the total number of commercial establishments receiving each non-network station for that month, adds those numbers together, and multiplies the resulting figure by the royalty rate for that reporting period (presently \$0.50 per non-network station per commercial account) to obtain the total copyright royalty fee due for that particular non-network station for commercial establishments during that reporting period and forwards that information and the corresponding payment to the Copyright Office. (See Exs. 2 and 5).

5. Survey Conducted by the Four Networks and the Affiliate Stations Associations

(a) Background

To check the representations made by DISH that DISH was no longer providing distant signals to subscribers who were ineligible to receive such distant signals, representatives of DISH, the four Networks, and the Associations jointly developed questionnaires to be sent to the Networks and to every station affiliated with the Networks.

The questionnaire was structured to obtain from each station information, both general and specific, as to any information that each such station might have in regard to asserted improper transmission by DISH of distant signals into that station's DMA, and to obtain specific information for further investigation in cases where the stations reported any such improper importation of distant signals. Examples of the questionnaires sent to each of the four Networks and to their affiliated stations are attached as Exhibits 7, 8, 9, and 10. All of the questionnaires are substantially identical, except for the separate identification of the Network involved and identification of the person to whom the completed questionnaire was to be returned.

After the Associations sent the questionnaires to each of their member stations, and those stations returned the completed questionnaires, the large majority of the returned questionnaires indicated no presently identifiable instances of DISH importing distant signals to unauthorized subscribers. In twenty instances, the questionnaire returned by one of the stations included one or more "yes" answers to the questions. In those instances, each questionnaire containing at least one "yes" answer was then provided to DISH for investigation and preparation by DISH of a response to the issue or issues raised by that "yes" answer.

In response to those twenty questionnaires, DISH provided its responses thereto in the attached Exhibit 11, entitled "STELA Survey Results Analysis DISH Network LLC." Attached to that survey analysis are copies of those twenty questionnaire responses, as sub-exhibits A-1 through A-20. In this Exhibit 11, names of stations and individuals were redacted for privacy.

Some of the issues raised were specific, asserting that subscribers within a particular DMA that had a local broadcast station for a given Network were also receiving signals from distant stations also affiliated with that Network and, in some instances, asserting that subscribers to a company called All American Direct ("AAD") were receiving such distant Network stations through their DISH satellite receivers. This issue had previously been raised in the litigation between the Plaintiffs and EchoStar/DISH, and the matter was appealed to the Eleventh Circuit Court of Appeals in *CBS Broadcasting Inc et. al v. EchoStar Communications et. al*, 532 F.3d 1294 (11th Cir. 2008). In that case, the Eleventh Circuit found that National Programming Service LLC ("NPS"), predecessor to AAD, entered into a lease agreement with EchoStar Communications Corp., d/b/a DISH, to lease space on the EchoStar satellite to provide broadcast television programming, including distant network broadcast signals, to persons who subscribed to NPS/AAD separately from DISH, and were paying NPS/AAD monthly subscription fees sent directly to NPS/AAD. *Id.* at 1297-98. The court found that NPS (now AAD) and EchoStar (now DISH) are separate and distinct companies that do not share any offices, directors, management, employees, or shareholders. *Id.* The court found that the agreement between EchoStar and NPS required NPS to contract independently with a company called Decisionmark to determine subscriber eligibility for receiving distant signals. *Id.* The Court held that the act of EchoStar/DISH of leasing space on its satellite for retransmission by NPS/AAD of distant stations did not make EchoStar a satellite carrier involved in the retransmission of distant network programming by NPS/AAD. *Id.* at 1302. The Eleventh Circuit found that the provision of distant signals by NPS/AAD to its subscribers, through the use of the DISH satellite, did not violate the injunction prohibiting EchoStar from providing distant signal to DISH subscribers who already received network signals from local stations. *Id.* at 1303.

In responding to the questions raised in the survey responses about broadcast of distant signals into markets already served by all of the networks, DISH stated that AAD, an independent company, currently offers network broadcast stations out of the New York and/or

San Francisco markets, and that some AAD subscribers may also be DISH subscribers, thus enabling subscribers to both DISH and AAD to obtain those distant signals from AAD, even where DISH did not provide such distant signals directly to its subscribers.

Many of the issues raised were stated in a broad, general manner, such as referencing an unidentified phone call from someone claiming to be receiving unauthorized distant market stations, or of seeing distant stations listed in channel guides or on the TV Guide website. DISH's response to each of these broad, general assertions was that, to DISH's knowledge, there were no DISH subscribers in the identified DMA to whom DISH provides distant network stations, with the exception of recreational vehicles and commercial trucks, which are treated as unserved households. DISH also noted the possibility that AAD might be providing some distant signals on the portion of the DISH satellite that AAD leases. DISH also noted that recreational vehicles and commercial trucks, which are considered unserved households under STELA (17 U.S.C. §119(a)(11)(A)(i)) and thus may be receiving distant signals, may be located in the subject DMA.

From my review of the potential issues presented by the "yes" responses to the twenty survey questionnaires referenced, and DISH's response to those issues raised, I believe that the responses to the survey questionnaires do not constitute substantial evidence that would support a finding of importation of distant signals by DISH to unauthorized subscribers. To the extent that any issues were raised by those questionnaires regarding distant signals, the issues appear from the questionnaires and DISH's response to be either (i) insufficiently specific to support a claim, (ii) the result of a mistake or of unauthorized relocation of the receiver by a subscriber, or (iii) a receiver on a vehicle.

6. Survey of Content Providers to Evaluate DISH's Compliance With Its Obligation to Pay Royalty Fees to the Copyright Office

On April 27, 2012, I spoke with attorneys representing several local television stations of the major content providers, including counsel to the Program Suppliers to the

networks and other stations², to counsel for the Joint Sports Claimants³, and counsel for the Broadcaster Claimant Groups⁴ to obtain any information they might have regarding compliance or non-compliance by DISH with its obligations to pay royalty fees to the Copyright Office pursuant to the statutory license under which DISH operated. These three groups advised that they represent the three largest groups of copyright owners entitled to receive royalty payments from DISH under 17 U.S.C §119. I requested that these representatives advise me if their clients had presented to them any issues or questions relating to the propriety of the statutory royalty fees that DISH had been paying to the Copyright Office.

In response to my request, the counsel for these three groups of copyright owners sent to me a letter dated May 11, 2012, a copy of which is attached hereto as Exhibit 12. In that letter, the three groups advised that they are unable to determine if DISH's performance under its statutory licenses complied with the royalty payment requirements of 17 U.S.C. §119, because they have not had the opportunity to audit critical information underlying the royalty calculations made in the statements of account that DISH has filed with the Copyright Office. They noted that STELA addressed this deficiency in the statutory license system by directing the Copyright Office to adopt regulations authorizing copyright owners to audit and verify the statements of account and royalty fees submitted by the satellite carriers and cable systems. See 17 U.S.C. §119(b)(2). The Copyright Office has since initiated a rulemaking procedure to

² Gregory Olaniran stated that his clients, the Program Suppliers, are producers and distributors of network and syndicated series, movies, and special broadcasts by television stations whose signals are retransmitted by satellite carrier. Membership in the group include Warner Brothers Entertainment, Inc., NBC Universal Inc., ABC Television Network, FOX Entertainment Group Inc., CBS Broadcasting Inc., Buena Vista Television, CBS Studios Inc., Sony Pictures Television Inc., Fremantle Media North America, Jeopardy Productions Inc., and Metro-Goldwyn-Mayer Studios Inc.

³ Robert Garrett advised that the Joint Sport Claimants comprise Major League Baseball, National Football League, National Basketball Association, Women's National Basketball Association, National Hockey League, and National Collegiate Athletic Association.

⁴ John Stewart advised that the Broadcaster Claimants Group is an ad hoc group of owners of U.S. commercial television broadcast stations, who, each year, have filed timely claims for their non-network, non-syndicated, station-produced programs, and the Group includes companies such as Cox Broadcasting, FOX Entertainment Group Inc., Gannett Company, Tribune Company, National Broadcasting Company, Tribune Broadcasting, Hearst Corporation, Sinclair Broadcast Group, Inc. and the Washington Post Company (d/b/a Post-Newsweek).

implement STELA's directive. See 77 Fed. Reg. 35643 (June 14, 2012). Initial comments on the proposed rules are due August 13, 2012. In the absence of any such final rule, the three content providers stated that they were unable to audit the royalty payment calculations. As a result, they provided no evidence of any improper calculations.

The methodology used by DISH to calculate its semi-annual royalty payments to the Copyright Office appears to follow the process set forth in 17 U.S.C. §119 (b)(1), as shown on the Copyright Office forms SC submitted by DISH (Ex. 2), and DISH's auditor has certified that DISH's financial statements present fairly the results of their operations and cash flows for each of the years in the three year period ending December 31, 2011. (Ex. 3). Thus, the data available for evaluation at this time appears to present no substantial evidence that a copyright holder could bring a successful action, under STELA, against DISH for infringement. If, subsequent to the submission of this Report, the Copyright Office were to adopt regulations authorizing copyright owners to verify and audit the statements of account and royalty fees submitted by DISH, as is provided in 17 U.S.C. §119(b)(2), it is possible that, sometime in the future, copyright holders might be able to ascertain some basis for challenging this finding. However, information presently available does not indicate that there is any substantial evidence to support such a claim.

CONCLUSION

The examination by the Special Master of documentation and information provided by DISH, the Networks and the Associations, along with the major content providers, showed no substantial evidence of delivery by DISH of distant signals to any persons other than eligible subscribers, nor any improprieties in the calculation and payment of royalties under DISH's statutory license. The examination further indicated no substantial evidence that a copyright

holder could bring a successful action, under the provisions of 17 U.S.C. §119, against DISH for infringement.

Respectfully submitted,

/s/ C. Douglas McDonald
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Special Master

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 23, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send electronic filing to the attorneys of record.

/s/C. Douglas McDonald

Attachment #10

**July 25, 2012 Order Directing Clerk to Transmit
Special Master's Report**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 98-02651-CIV-DIMITROULEAS

CBS BROADCASTING, INC. *et al.*

Plaintiffs,

vs.

ECHOSTAR COMMUNICATIONS
CORP., *et al.*,

Defendant

ORDER DIRECTING CLERK TO TRANSMIT SPECIAL MASTER'S REPORT

THIS CAUSE is before the Court upon the Report of the Special Master [DE 1199], filed July 23, 2012. 17 U.S.C. § 119(g)(4)(B)(iii) directs this Court to "transmit a copy of the report to the Register of Copyrights, the Committees on the Judiciary and on Energy and Commerce of the House of Representatives, and the Committees on the Judiciary and on Commerce, Science, and Transportation of the Senate."

Accordingly, the Clerk is **DIRECTED** to transmit the report as required by 17 U.S.C. § 119.

DONE AND ORDERED in Chambers, Ft. Lauderdale, Broward County, Florida, this 25th day of July, 2012.


WILLIAM P. DIMITROULEAS
United States District Judge

Copies provided to:
Counsel of Record

Attachment #11

**December 12, 2012 Report of the Government
Accountability Office, "DISH Network Complied with
the Court-Appointed Special Master's Examination of
Its Compliance with the Section 119 Statutory
License"**



United States Government Accountability Office
Washington, DC 20548

December 12, 2012

Congressional Committees

Subject: DISH Network Complied with the Court-Appointed Special Master's Examination of Its Compliance with the Section 119 Statutory License

This report responds to the requirement, enacted in the Satellite Television Extension and Localism Act of 2010 (STELA),¹ mandating that the Comptroller General monitor and periodically report on the degree to which DISH Network (DISH)² was complying with the Special Master's³ examination of its compliance with the royalty payment and household eligibility requirements of the Section 119 statutory license.⁴ On March 23, 2012, we issued our first report on this subject;⁵ at the time, we found that DISH was complying with the Special Master's examination. In this report, our second and final report on this subject, we address DISH's compliance through the completion of the Special Master's examination.

To respond to this mandate, we interviewed the Special Master and analyzed documents he provided. We conducted this performance audit from June 2012 to December 2012 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Summary

We found that DISH complied with the Special Master's examination. DISH provided the Special Master with information on its subscribers and royalty payments, and cooperated on a survey of all major network-affiliated broadcast stations nationwide. Since our March 23, 2012, report, the Special Master issued a report noting that there was no substantial evidence of improprieties by DISH regarding the Section 119 statutory license.

¹Pub. L. No. 111-175, § 105, 124 Stat. 1218, (2010) amending title 17, U.S.C. by adding § 119(g)(4)(B)(vii).

²From 1996 through 2008, DISH Network was the media and entertainment arm of EchoStar Communications Corporation. In 2008, EchoStar divested DISH Network. In this report, we refer to DISH Network and its predecessor as DISH.

³A Special Master is appointed by a judge to carry out the duties set out in the order appointing him.

⁴The Special Master's examination and reporting requirements are set out at 17 U.S.C. § 119(g)(4)(B).

⁵GAO, *To Date, DISH Network Is Cooperating with the Court-Appointed Special Master's Examination of Its Compliance with the Section 119 Statutory License*, GAO-12-496R (Washington, D.C.: Mar. 23, 2012).

Background

The four major broadcast networks—ABC, CBS, Fox, and NBC—own or have affiliate television broadcast stations in most local television markets, known as designated market areas (DMA),⁶ throughout the nation. However, some local television markets lack access to one or more of the four major broadcast networks; these markets are referred to as *short markets*. Further, some households are unable to receive an adequate over-the-air signal from one or more of the local stations owned by or affiliated with the four major broadcast networks, typically because these households reside a significant distance from the television station's broadcast antenna; these households are also *unserved households*.⁷

More than 30 million U.S. households have access to broadcast programming through subscriptions to direct broadcast satellite (DBS) service.⁸ When a DBS operator provides its subscribers access to broadcast programming, it is providing secondary transmission of the programming. Because the broadcast programming is copyright protected, a license is required for the secondary transmission of these works.⁹ Section 119 of title 17 of the United States Code allows DBS operators, such as DISH, to provide distant, out-of-market television broadcast signals to subscribers in short markets and to other unserved households;¹⁰ this is referred to as *distant-into-local service*. In addition, a separate license found at Section 122 of title 17 allows DBS operators to provide local television broadcast signals to subscribers in the same local area; this is referred to as *local-into-local service*. To take advantage of the Section 119 license, DBS operators must deposit with the U.S. Copyright Office a government-set royalty, which is later distributed to copyright owners.¹¹

In 1998, a few years after DISH started providing satellite transmission of broadcast programming to its subscribers, the four major broadcast networks and others filed suit alleging that DISH provided distant, out-of-market television broadcast signals to served households, which were ineligible for such service. In 2006, following a decision by the Eleventh Circuit Court of Appeals, DISH was found to have engaged in a pattern or practice in violation of Section 119 by improperly transmitting distant network signals to ineligible households and was permanently enjoined from providing distant-into-local transmission of all programming originating on stations affiliated with the four major broadcast networks.¹²

In 2010, Congress, through STELA, amended 17 U.S.C. § 119 to provide a remedy permitting DISH to seek relief from the injunction issued under Section 119. By providing local-into-local service in all 210 DMAs, DISH became eligible for recognition as a “qualified

⁶Nielsen Media Research defines the DMAs. According to Nielsen, a DMA identifies an exclusive geographic area of counties in which the home market television stations hold a dominance of total hours viewed. There are 210 DMAs in the United States.

⁷The Federal Communications Commission categorizes television broadcast signals by grades of signal strength, with Grade A being the strongest. An unserved household is unable to receive a signal of Grade B strength or better. Unserved households include homes of all types, including recreational vehicles and commercial trucks.

⁸In addition to DBS service, over 55 million households have access to broadcast programming through subscriptions to cable service.

⁹This is the right to show the copyright-protected work in public. 17 U.S.C. § 106(4).

¹⁰With a statutory license, the DBS operator does not need to obtain the copyright holder's permission for the secondary transmission as long as it follows the regulations and pays the Copyright Office the required royalty.

¹¹The statutory licenses permit the public performance of the copyright-protected works in exchange for payment of royalties established using processes defined by statute.

¹²*CBS Broadcasting, Inc. v. EchoStar Communications Corp.*, 450 F.3d 505 (11th Cir. 2006).

carrier” and to then request that the court waive its injunction. On June 30, 2010, DISH filed an Application for Certification with the Federal Communications Commission (FCC) requesting qualified carrier status under Section 119, which FCC granted on September 1, 2010. However, as a further condition for approval, STELA directed the court to appoint a Special Master to conduct a compliance examination of DISH. On November 24, 2010, in accord with 17 U.S.C. § 119(g)(4)(B), the District Court for the Southern District of Florida appointed a Special Master under rule 53 of the Federal Rules of Civil Procedure to perform the required examination and report his findings to the court. The Special Master was required to examine and file a report on DISH’s compliance with the household eligibility requirements associated with the Section 119 license and the royalty payments to the Copyright Office. If the qualified carrier (DISH) was found to have willfully made a secondary transmission in violation of the statute, the waiver would be lifted and the permanent injunction would be reinstated.

DISH Complied with the Special Master’s Examination

We found that DISH complied with the Special Master’s examination, which consisted of examining DISH’s compliance with the royalty payment and household eligibility requirements of the license under Section 119. During his examination, the Special Master held regular meetings with DISH and representatives of the four major networks and their affiliates. The Special Master reported that DISH provided monthly reports of its distant, out-of-market signals; its Copyright Office submissions; and its auditor’s report. DISH also provided GAO with the same information, as we requested. As we discussed in our March 23, 2012, report, DISH and representatives of the four major networks and their affiliates collaborated on a survey of all major network-affiliated broadcast stations nationwide; the purpose of the survey was to determine whether any problem existed with DISH’s services to eligible subscribers. The Special Master told us that DISH fully responded to the 20 instances where a survey respondent raised a question about the importation of distant signals, which were found to be without merit. The Special Master told us that he was impressed with how well the parties of both sides—DISH and representatives of the four major networks and their affiliates—worked together on the effort and that they provided all the documents that he requested to conduct his examination.

In his July 23, 2012, report, the Special Master found that the documentation and information provided by DISH, the networks, the associations, and the major content providers showed (1) no substantial evidence of delivery by DISH of distant signals to any persons other than eligible subscribers and (2) no improprieties in the calculation and payment of royalties under DISH’s statutory license. The Special Master concluded that there was no substantial evidence that a copyright holder could bring a successful action, under the provisions of 17 U.S.C. § 119, against DISH for infringement. The court directed that the Clerk of the District Court for the Southern District of Florida transmit the Special Master’s report to Congress in accordance with 17 U.S.C. § 119. According to the Clerk’s office, this matter is considered to be closed.

Agency and Third-Party Comments

We provided a draft of this report to DISH Network, the Federal Communications Commission, and the Special Master for review and comment. The Special Master noted that the draft report appeared to represent correctly the underlying facts and the conclusions set forth in his analysis and report, and that it appeared to accurately summarize his July 23, 2012, report. The Federal Communications Commission and DISH Network did not provide comments.

We are sending copies of this report to DISH Network; the Chairman, Federal Communications Commission; and the Special Master. In addition, the report is available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staffs have questions about this report, please contact me at (202) 512-2834 or goldsteinm@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Key contributors to this report were Mike Clements (Assistant Director), Martha Chow, and Bert Japikse.

A handwritten signature in black ink, appearing to read 'Mark Goldstein', with a long horizontal flourish extending to the right.

Mark Goldstein
Director
Physical Infrastructure Issues

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